(4) (3)

Nos. 91-790 and 91-1206

In the Supreme Court of the United States

OCTOBER TERM, 1991

CSX TRANSPORTATION, INC., PETITIONER

v.

LIZZIE BEATRICE EASTERWOOD

LIZZIE BEATRICE EASTERWOOD, PETITIONER

v.

CSX TRANSPORTATION, INC.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

MAUREEN E. MAHONEY
Deputy Solicitor General

WILLIAM K. KELLEY
Assistant to the Solicitor General

WILLIAM KANTER
JEFFREY CLAIR
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether federal statutes and regulations relating to railroad-highway grade crossings preempt a state law cause of action against a railroad based on its alleged failure to design and maintain a reasonably safe grade crossing.

2. Whether federal statutes and regulations setting speed limits for trains on all classes of track nationwide preempt a state law cause of action against a railroad for operating its train at an unreasonably excessive speed.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and regulations:

Statutes and regulations—Continued: Page

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-790

CSX TRANSPORTATION, INC., PETITIONER

v.

LIZZIE BEATRICE EASTERWOOD

No. 91-1206

LIZZIE BEATRICE EASTERWOOD, PETITIONER

v.

CSX TRANSPORTATION, INC.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

On February 24, 1988, Thomas Easterwood, the husband of cross-petitioner Lizzie Beatrice Easterwood, was killed when the truck he was driving was struck by a locomotive operated by CSX Transportation, Inc. Invoking federal diversity jurisdic-

tion, Mrs. Easterwood filed a wrongful death action against petitioner CSX Transportation, Inc. in the United States District Court for the Northern District of Georgia. Mrs. Easterwood alleged that CSX was liable because (1) the grade crossing was negligently designed and maintained, and (2) the train that struck her husband's truck was travelling at an excessive speed. The question presented by these two cases is the extent to which those state law tort claims are preempted by federal law. Several federal statutes relating to rail and highway safety bear on the analysis, as do regulations promulgated by two components of the Department of Transportation, the Federal Railroad Administration (FRA) and the Federal Highway Administration (FHWA).

1. a. Congress enacted the Federal Railroad Safety Act of 1970 (FRSA), 45 U.S.C. 421 *et seq.*, to "promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons and to reduce damage to property caused by accidents involving any carrier of hazardous materials." 45 U.S.C. 421. In order to achieve these goals, FRSA vests the Secretary of Transportation with broad authority to prescribe rules, regulations, orders, and standards in all areas of rail safety. 45 U.S.C. 431.

Two provisions of FRSA specifically address the regulation of railroad-highway grade crossings. First, the statute directs the Secretary to "undertake a coordinated effort toward the objective of developing and implementing solutions to the grade crossing problem." 45 U.S.C. 433(b). Second, in an amendment added after the accident at issue here, Congress directed the Secretary to issue by June 22, 1989, "such rules, regulations, orders, and standards

as may be necessary to ensure the safe maintenance, inspection, and testing of signal systems and devices at railroad highway grade crossings." 45 U.S.C. 431(q), added by the Rail Safety Improvement Act of 1988, Pub. L. No. 100-342, § 23, 102 Stat. 639.

The Secretary has delegated to the Administrator of FRA general authority to promulgate rail safety rules and regulations under FRSA. 49 C.F.R. 1.49(m). In addition, insofar as Section 431(q)'s rulemaking authority implicates other federal laws pertaining to highway safety, the Secretary has also delegated his rulemaking authority to the Administrator of the FHWA. See 49 C.F.R. 1.48(o), 1.49(m). FRA has promulgated standards for track safety, operating rules and practices, the control of alcohol and drug use, and other matters affecting rail safety. See, *e.g.*, 49 C.F.R. Pts. 213, 217, 218, and 219. FRA has also promulgated regulations (effective October 1, 1991) that require railroads to file reports on the performance, maintenance, testing, and inspection of grade crossing signal systems. 56 Fed. Reg. 33,722 (1991).

The Secretary may enforce regulations promulgated under FRSA through issuance of compliance orders and assessment of civil penalties. 45 U.S.C. 437, 438. Those orders are subject to enforcement in actions (in which injunctive relief is available) brought by the Attorney General in federal district court. See 45 U.S.C. 438-439.[1] The Act does not

[1] The statute specifies that monetary penalties, to be paid into the United States Treasury, may be imposed for each violation of a regulation, in an amount from $250 to $10,000 per violation; in cases "where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or

provide a private right of action to enforce its provisions.

FRSA addresses the role of the States in the regulatory scheme in two respects. First, the statute provides that the States may participate in inspection and surveillance activities if they establish a state program and comply with certain reporting requirements. 45 U.S.C. 435(a).[2] In cases where the Secretary has declined to bring enforcement proceedings arising out of a violation, a participating State is authorized to bring an enforcement action in federal district court seeking monetary or injunctive relief. 45 U.S.C. 436 (a), (b). If the Secretary determines that no violation occurred, however, the State is not permitted to bring such an action. 45 U.S.C. 436(a)(2), (b)(2). By explicitly defining the role of the States in bringing enforcement proceedings, Congress made clear its understanding that States would not be permitted independently to participate in regulatory enforcement of federal railroad safety rules. See H.R. Rep. No. 1194, 91st Cong., 2d Sess. 11, 18-19 (1970).[3]

Second, FRSA contains an express preemption provision. Section 434 provides:

---

injury," a penalty of up to $20,000 may be imposed. 45 U.S.C. 438(b). In addition, the statute authorizes criminal penalties for certain violations of reporting and record keeping requirements. 45 U.S.C. 436(e).

[2] The Secretary has promulgated regulations implementing the statutory authorization for States to participate in enforcement of the federal regime. See 49 C.F.R. Pt. 212.

[3] In addition, in 23 U.S.C. 402(b), Congress mandated, as a condition on federal funding, that state agencies implementing safety programs (including the Rail-Highway Crossings Program) be empowered to enforce such programs to the satisfaction of the Secretary of Transportation.

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. 434.

b. The hazards posed by grade crossings implicate highway as well as rail safety. Thus, in addition to FRSA, federal highway legislation addresses the safety of railroad-highway grade crossings. First, Congress has made available to the States federal funds "for the elimination of the hazards of railway-highway crossings." 23 U.S.C. 130(a). At least half of those funds must be used to install signals and other protective devices. 23 U.S.C. 130(e). In addition, railroads are liable to the United States for the value of any benefit received as a result of a federally funded grade crossing improvement project involving track they own. 23 U.S.C. 130(b), (c). The Secretary has determined, however, that such projects are "of no ascertainable net benefit to the railroads and there shall be no required railroad share of the costs." 23 C.F.R. 646.210(b)(1).

Second, Congress has required the States to develop a program to identify dangerous railroad grade crossings and to make them safe. As part of the Rail-Highway Crossings Program, the States must "maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." 23 U.S.C. 130(d); see also 23 C.F.R. 924.9; 23 C.F.R. 1204.4, Highway Safety Program Guideline No. 12(G). The responsibility to survey and improve the safety of grade crossings is part of the States' broader responsibility to have in place a highway safety program as a condition on receipt of federal funding of highway safety improvement projects. See 23 U.S.C. 402(c). To obtain the Secretary's approval of its Section 402 program, a State must provide assurances that its program will be administered through a state agency with "adequate powers * * * to carry out [the program] to the satisfaction of the Secretary." 23 U.S.C. 402(b); see also 23 C.F.R. Pts. 924, 1204.

Finally, Congress has directed the Secretary to promulgate uniform federal standards governing highway and rail safety. 23 U.S.C. 402(a); see also 23 U.S.C. 109(d). The Secretary has accordingly promulgated uniform standards governing, among other matters, the form and placement of traffic control devices installed at railroad-highway grade crossings. Those standards are set forth in the Manual on Uniform Traffic Control Devices (Manual or MUTCD). Any protective device installed at a federally funded grade crossing project must comply with the Manual's requirements for design, placement, operation, maintenance, and uniformity. 23 C.F.R. 646.214(b), 655.603. The Manual does not, however,

specify when particular safety devices are required. This is based on the recognition that those decisions are engineering judgments to be made by responsible local authorities on a case-by-case basis. See MUTCD 1A-4.

2. Following her spouse's death, Mrs. Easterwood sued the railroad for tort damages in her capacity as executrix of Mr. Easterwood's estate. She alleged that CSX was negligent under Georgia law because it (1) failed to install gate arms at the grade crossing and failed to remove a dangerous hump in the grade crossing surface; and (2) operated the train at an unsafe speed.[4] CSX Pet. App. 24a, 27a.

The district court granted summary judgment for the railroad. CSX Pet. App. 28a. The court held that allegations concerning the adequacy of the crossing signals and safety of the train's operating speed were preempted by federal law. *Id.* at 26a-27a. The court also held that, in light of Mrs. Easterwood's inability to produce supporting evidence or establish a dispute as to issues of material fact, CSX was entitled to judgment on the claims alleging negligence in maintaining the condition of the crossing. *Id.* at 27a.

3. The court of appeals affirmed in part and reversed in part. The court agreed that Easterwood's negligence claim based on excessive train speed was preempted by FRA regulations. The court of appeals

---

[4] Mrs. Easterwood also claimed that the railroad negligently allowed vegetation, which obscured motorists' view of oncoming trains, to grow adjacent to the tracks. The court of appeals held that claim to be partially preempted. See CSX Pet. App. 10a. Neither party has challenged in this Court the court of appeals' treatment of that issue.

held, however, that federal law did not preempt a railroad's state-law duty to construct and maintain safe grade crossings. CSX Pet. App. 10a-12a. The court reasoned that FRSA's express preemption provision, 45 U.S.C. 434, was not implicated because the Secretary had not promulgated any regulations relating to grade crossing safety pursuant to that statute. See CSX Pet. App. 10a-11a. Federal *highway* legislation does address grade crossing safety, see 23 U.S.C. 130, but that legislation does not expressly preempt state law and "is not such a pervasive set of regulations that we could fairly imply a congressional intent to pre-empt the field." CSX Pet. App. 11a.

DISCUSSION

1. The courts of appeals have adopted widely disparate positions on the question whether state tort claims based on unsafe grade crossings are preempted (the question presented in No. 91-790). We believe that the issue is of substantial importance and recurs so frequently that review by this Court is warranted. Since the petition and cross-petition for certiorari were filed in these cases, the Tenth Circuit has also addressed the issue in a holding that conflicts with the decision in this case, and there is now little doubt that the issue is ripe for this Court's review. There is less need to review the issue in No. 91-1206—whether state law tort claims based on excessive train speed are preempted—because the decision below is the first federal appellate decision on that question. We nonetheless are persuaded, for the reasons explained below, that the cross-petition should be granted as well.

a. The four courts of appeals that have addressed whether federal law preempts state tort law claims

based on negligent design of railway grade crossings have adopted no fewer than four separate approaches. In addition to the Eleventh Circuit in this case, the Eighth Circuit has concluded that federal law does not preempt state tort claims based upon the alleged inadequacy of warning devices at grade crossings. *Karl* v. *Burlington Northern Railroad Co.*, 880 F.2d 68, 75-76 (8th Cir. 1989). The *Karl* court did not, however, even discuss the issue of express preemption under 45 U.S.C. 434. See 880 F.2d at 75-76. The Eleventh Circuit below, in contrast, held that express preemption under 45 U.S.C. 434 is not implicated by regulations promulgated pursuant to federal highway legislation.[5]

---

[5] In our view, the Eleventh Circuit was clearly wrong to view Section 434 as being triggered only by regulations adopted pursuant to FRSA. The plain language of the statute refers to *any* regulation adopted by the Secretary of Transportation, regardless of the source of statutory authorization. Thus, regulations adopted by the Secretary pursuant to federal highway legislation trigger FRSA's express preemption if a State regulation "relate[s] to railroad safety" and the Secretary's regulations "cover[] the subject matter" of the state law requirement at issue. 45 U.S.C. 434. We took that position in our brief *amicus curiae* urging the Court to deny certiorari in *Public Utilities Comm'n of Ohio* v. *CSX Transp., Inc.*, cert. denied, 111 S. Ct. 781 (1991) (*PUCO*). In *PUCO*, we agreed with the Sixth Circuit that regulations promulgated by the Secretary under the Hazardous Materials Transportation Act, 49 U.S.C. App. 1801 *et seq.*, which regulate the transport of hazardous materials by train, expressly preempted similar state regulations by virtue of 45 U.S.C. 434. See *CSX Transportation, Inc.* v. *Public Utilities Comm'n of Ohio*, 901 F.2d 497 (6th Cir. 1990), cert. denied, 111 S. Ct. 781 (1991). The Eleventh Circuit's analysis in this case conflicts with the Sixth Circuit's decision in *PUCO*.

The Ninth Circuit has adopted a third approach. *Marshall* v. *Burlington Northern, Inc.*, 720 F.2d 1149, 1154 (9th Cir. 1983) (per Kennedy, J.), held that the MUTCD, as well as federal regulations requiring States to survey the safety of grade crossings and implement appropriate improvement projects as a condition on receipt of federal funds, see 23 C.F.R. Pt. 924, constituted a delegation of the Secretary's authority to regulate railroad safety at grade crossings under FRSA. Thus, a decision by a state or local agency that particular safety devices are necessary (or unnecessary) to make a grade crossing safe constitutes a regulation of the Secretary covering the subject matter of grade crossing safety at that crossing. The court held, however, that "[u]ntil a federal decision is reached through the local agency on the adequacy of the warning devices at [a particular] crossing, the railroad's duty under applicable state law to maintain a 'good and safe' crossing * * * is not preempted." 720 F.2d at 1154. Once a local assessment of the safety needs at a crossing is made, however, express preemption under 45 U.S.C. 434 is triggered; thereafter, state tort claims relating to unsafe grade crossing conditions are preempted altogether. The Ninth Circuit's contingent preemption approach is thus inconsistent with that of the court of appeals in this case and the Eighth Circuit in *Karl*.[6]

[6] The court of appeals in this case thought *Marshall* was "distinguishable" because the failure to act by the local authorities with respect to the grade crossing at issue was not because of an affirmative decision that the crossing was safe. CSX Pet. App. 12a. Thus, the court of appeals said, "we have no occasion to decide whether a federally sponsored upgrade would insulate the railroad from liability." *Ibid.* The court of appeals failed to recognize, however, that the *Marshall* court found no preemption because the local authorities had not made a decision as to what safety devices were appropriate at the crossing at issue there. See 720 F.2d at 1154. In this case, the district court concluded that the safety of the crossing had been analyzed, and local authorities determined that a crossing gate was needed; that decision was not implemented, however, because the funds earmarked for the project were directed to other higher priority uses. See CSX Pet. App. 26a. Thus, under the Ninth Circuit's analysis, the case for preemption here was *stronger* than in *Marshall* itself. The court of appeals, however, completely glossed over the complexities added to the preemption analysis by an unexecuted local decision that safety devices are appropriate. In any event, despite the fact that the Eleventh Circuit expressed only "reservations," *id.* at 12a n.5, about *Marshall*, it is clear that the Eleventh and Ninth Circuit's analytical approaches are diametrically at odds, and lead to divergent results.

Moreover, there can be no doubt that a different result would have been reached on these facts in the Tenth Circuit. In the recent case of *Hatfield* v. *Burlington Northern R.R.*, 958 F.2d 320 (10th Cir. 1992), the Tenth Circuit held that state-law grade crossing claims have been preempted. The court agreed with *Marshall*'s holding that the federal regulations pertaining to grade crossing safety "cover[] the subject matter" of grade crossing safety within the meaning of 45 U.S.C. 434, and thus preempt any common law duty of care to provide adequate safety devices. In contrast to the Ninth Circuit's contingent preemption approach, however, the *Hatfield* court held that the mere *adoption* of the federal scheme, as opposed to the local determination as to what safety steps are required to make particular grade crossings safe, preempted the entire field. Thus, no state-law claim relating to the safety of any grade crossing is permissible, because adop-

tion of the MUTCD "absolved railroads from complying with duties imposed by state law." 958 F.2d at 324.[7]

Not only are the courts of appeals in conflict, the issue is of considerable importance. Railway grade crossing accidents are regrettably common, and thus continue to pose a serious threat to life and property. The Department of Transportation reports that in calendar year 1990 there were 5,022 motor vehicle accidents at railroad-highway crossings, resulting in 568 deaths and 2,186 injuries. Federal Railroad Administration, *Rail-Highway Crossing Accident/Incident and Inventory Bulletin*, No. 13, at 2 (July 1991). This volume of accidents suggests that the underlying legal issues warrant review by this Court.

---

[7] Decisions of other federal and state courts reflect a similar divergence of opinion. Some have followed the Eighth Circuit's approach in *Karl* v. *Burlington Northern Railroad*, *supra*, and held that federal regulation does not preempt a railroad's general duty to exercise reasonable care at a grade crossing. See, *e.g.*, *Southern Pacific Transportation Co.* v. *Maga Trucking Co.*, 758 F. Supp. 608 (D. Nev. 1991); *Runkle* v. *Burlington Northern*, 613 P.2d 982 (Mont. 1980); *Southern Railroad Co.* v. *Georgia Kraft Co.*, 373 S.E.2d 774 (Ga. Ct. App. 1988). Some decisions have followed the Ninth Circuit's approach in *Marshall*, holding that the duty to exercise reasonable care at a crossing is preempted only if the state or local government has made a determination with respect to the adequacy of that crossing pursuant to the federal program. See *Case* v. *Norfolk & Western Railway Co.*, No. S-90-24 (Ohio Ct. App. Oct. 18, 1991); *Anderson* v. *Chicago Central and Pacific Railroad Co.*, 771 F. Supp. 227 (N.D. Ill. 1991). And some decisions have followed the Tenth Circuit's approach in *Hatfield*, holding that the MUTCD preempts all state law tort remedies, without regard to whether the state or local agency has determined whether the warning devices at the crossing are adequate. *Armijo* v. *Atchison, Topeka, and Santa Fe Railway Co.*, 754 F. Supp. 1526 (D. N.M. 1990).

b. The issue raised by cross-petitioner Easterwood —whether federal regulations pertaining to train speed prempt common law claims based on unsafe train operation—is not ripe for review in its own right. A number of federal courts have considered whether municipal ordinances regulating train speed are preempted by federal law, and have generally held that only States, not local governments, retain authority under 45 U.S.C. 434 to adopt supplemental rail safety regulation pertaining to "local safety hazards." See, *e.g.*, *Donelon* v. *New Orleans Terminal Co.*, 474 F.2d 1108 (5th Cir.), cert. denied, 414 U.S. 855 (1973); *CSX Transportation, Inc.* v. *City of Thorsby, Alabama*, 741 F. Supp. 889 (M.D. Ala. 1990); *Consolidated Rail Corp.* v. *Smith*, 664 F. Supp. 1228 (N.D. Ind. 1987); *Sisk* v. *National Railroad Passenger Corp.*, 647 F. Supp. 861 (D. Kan. 1986).[8] As noted, however, the Eleventh Circuit's decision in this case is the first federal appellate treatment of the issue whether state common law duties are similarly preempted by federal train speed regulations.

Although the issue presented in No. 91-1206 would therefore ordinarily not warrant review, we believe that the Court should grant the cross-petition in tandem with the clearly meritorious petition in No. 91-790. The cross-petition raises doctrinal issues similar to those in the petition, and involves application of the

---

[8] The analysis of these cases is cast into some doubt by this Court's decision in *Wisconsin Public Intervenor* v. *Mortier*, 111 S. Ct. 2476 (1991). In that case, the Court held that an affirmative grant of regulatory authority to States could not generally be read impliedly to exclude similar authority in local political subdivisions, because the subdivisions are "components of the very entity the statute empowers." 111 S. Ct. at 2483.

same statutory scheme. The relevant regulations, however, differ significantly in their approach to the safety issues they address. Application of the Court's preemption analysis to both sets of regulations would accordingly provide substantially greater guidance to the lower courts.

2. The principles governing preemption analysis are well established. State law is preempted under the Supremacy Clause, U.S. Const. Art. VI, Cl. 2, when Congress expressly so provides. See, *e.g.*, *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983). In the absence of such express preemption, preemption will nonetheless be implied when it is clear that Congress intended federal regulation of a field to be exclusive. See, *e.g.*, *English* v. *General Electric Co.*, 496 U.S. 72 (1990); *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983). Such an intent may be inferred from a "scheme of federal regulation * * * so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 299-300 (1988) (citing *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Finally, state law is preempted to the extent that it actually conflicts with federal law. Such a conflict is present where it is impossible to comply with both federal and state requirements (see *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963)), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

In every case, whether state law is preempted turns on congressional intent. If a lawfully promulgated agency regulation is at issue, that regulation's preemptive scope is similarly determined by the intent of the issuing authority. *FMC Corp.* v. *Holliday*, 111 S. Ct. 403, 407 (1990); *Fidelity Federal Savings & Loan Ass'n* v. *De La Cuesta*, 458 U.S. 141, 154 (1982). The Court has made clear, however, that preemption is not to be found in fields traditionally regulated by the States under the historic police power "unless that was the clear and manifest purpose of Congress." *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985) (quoting *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977) and *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. at 230). State tort law is undoubtedly within the States' historic police power, see, *e.g.*, *Farmer* v. *United Brotherhood of Carpenters*, 430 U.S. 290, 304 (1977), and Georgia has traditionally imposed upon railroads a common law duty to exercise reasonable care at grade crossings. See, *e.g.*, *Macon & Western R.R. Co.* v. *Davis*, 18 Ga. 679 (1855); *Berry* v. *Northeastern R.R.*, 72 Ga. 137 (1883).[9] Thus, Mrs. Easterwood's claims are presumed not to be preempted, and CSX bears the burden in seeking to demonstrate the contrary.

3. Application of this general framework to the issues presented by the petitions here is a matter of considerable complexity and difficulty. Since the Court issued its order of March 23, 1992, inviting the views of the United States, we have been in the process of

---

[9] Georgia has codified this common law duty, and now requires railroads "to maintain * * * grade crossings in such condition as to permit the safe and convenient passage of public traffic." Ga. Code Ann. § 32-6-120 (Michie 1991).

comprehensively reviewing the legal questions presented. That review is being conducted in conjunction with the agencies charged with administering and enforcing the federal railroad safety statutes and regulations. We have been unable to complete our review of the merits during the intervening period. However, in view of our conclusion that the petition in No. 91-790 clearly warrants review, and that, on balance, the cross-petition in No. 91-1206 does as well, we believe that the better course is to so advise the Court now, so the decision whether to grant review can be made during the Court's current term.

As described above, Section 434 of FRSA is an express preemption provision that defines the scope of state authority to regulate railroad safety. State law "relating to railroad safety" may continue in force "until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement." 45 U.S.C. 434.[10] In light of Section 434's language, the key question in determining whether a particular state law may continue in force is whether the Secretary has promulgated a regulation "covering the subject matter of such State requirement." See *Missouri Pacific R. Co.* v. *Railroad Comm'n of Texas*, 833 F.2d 570, 574-575 & n.5 (5th Cir. 1987) (state regulation is preempted only if it would impair or supplement a federal scheme that "superintends" a particular safety hazard).

a. The issue presented in CSX's petition for certiorari, No. 91-790, is whether a cause of action based

[10] That rule is limited by the qualification that compatible state regulation of a matter covered by federal regulation is nonetheless permissible if necessary "to eliminate or reduce what is essentially a local hazard," and if it does not unduly burden interstate commerce. 45 U.S.C. 434.

on breach of a state law duty to provide a safe grade crossing has been preempted. CSX claims that two sets of regulations promulgated by the Department of Transportation "cover" the subject matter of a state law duty of care to provide a safe grade crossing, and hence preempt that duty under Section 434. First, the MUTCD establishes standards for such matters as the selection, design, location, illumination, and construction of the signs and other safety devices placed at a grade crossing.[11] The MUTCD was developed by the FHWA in response to congressional directives to develop uniform standards for federally assisted state highway safety programs, see 23 U.S.C. 402(a), to develop standards for traffic signals and other warning devices installed on federally assisted highway projects, see 23 U.S.C. 109(d), and to "develop[] and implement[] solutions to the grade crossing problem." 45 U.S.C. 433(b). It constitutes "the national standard for all traffic control devices installed on any street, highway, or bicycle trail open to public travel in accordance with 23 U.S.C. 109(d) and 402(a)." 23 C.F.R. 655.603(a).

With respect to grade crossings in particular, the MUTCD provides that the duty to maintain grade crossings is a "joint responsibility" of the railroads and the States. MUTCD 8A-1.[12] The MUTCD does

[11] Exercising authority delegated from the Secretary, FHWA has incorporated the MUTCD into federal law, see 23 C.F.R. 655.601(b).

[12] The Manual states:

> [T]he highway agency and the railroad company are entitled to jointly occupy the right-of-way in the conduct of their assigned duties. This requires joint responsibility in the traffic control function between the public agency

not prescribe substantive standards for determining whether particular safety devices are appropriate at a grade crossing, stating that the "determination of need and selection of devices at grade crossings is made by the public agency with jurisdictional authority." *Ibid.*[13] Moreover, the MUTCD prohibits railroads from implementing any improvements to grade crossings without first obtaining the responsible public agency's approval. *Id.* at 8D-1 ("Before a new or modified grade crossing traffic control system is installed, approval is required from the appropriate agency within a given State.").

In addition to the MUTCD, the body of federal regulations implementing the Rail-Highway Crossings Program, 23 US.C. 130(d), bears on the analysis. See 23 C.F.R. Pts. 630, 924. Under the Rail-Highway Crossings Program, 23 U.S.C. 130, the federal government provides funds to state and local governments to reduce or eliminate hazards at grade crossings. In particular, 23 U.S.C. 130(d) requires States to identify hazardous crossings and to establish a schedule

---

and the railroad. The determination of need and selection of devices at grade crossings is made by the public agency with jurisdictional authority. Subject to such determination and selection, design, installation and operation shall be in accordance with the national standards contained herein.

MUTCD 8A-1.

[13] See also MUTCD 1A-4 ("while this Manual provides standards for design and application of traffic control devices, the Manual is not a substitute for engineering judgment"); *id.* at 8D1-1 ("Due to the large number of significant variables which must be considered there is no single standard system of active traffic control devices universally applicable for grade crossings.").

for implementing crossing improvements. Consistent with the scope of the statute, the Secretary's regulations establish procedural requirements that States must meet in implementing their programs. See 23 C.F.R. Pts. 630, 924. Like the MUTCD, the statute and regulations do not generally establish substantive standards for what constitutes a safe grade crossing. Cf. 23 C.F.R. 646.214(b)(3)(i).

Resolution of the question in No. 91-790 requires analysis of the body of federal regulations pertaining to grade crossings and its effect on a state law duty of care to provide safe grade crossings.[14] If the federal scheme "cover[s] the subject matter" of that state-law "requirement," Section 434 requires state law to give way. Moreover, a predicate to that analysis is the determination of what state law "requirement" is at issue—a question that neither the lower courts nor the parties have focused on. Finally, apart from express preemption under Section 434, the Court must also consider whether a state law tort remedy for a person injured as a result of a railroad's failure to provide a safe grade crossing conflicts with, or stands as an obstacle to, the federal regulatory regime. Unlike Section 434 preemption (which can only be triggered by the Secretary's regulations), that "conflict" preemption analysis must take account of both the Secretary's regulations and FRSA and other highway legislation relating to grade crossings.

b. The issue presented in the cross-petition, No. 91-1206, is whether a state law cause of action based on a railroad's violation of a duty to travel at a speed that

---

[14] In addition to the possible preemptive effect of the regulations implementing the Rail-Highway Crossings Program pursuant to Section 434's express preemption, the independent preemptive force of 23 U.S.C. 130 must also be considered.

is reasonable under the circumstances has been preempted. The Secretary—through the FRA—has promulgated regulations setting maximum train speeds on all track throughout the country. See 49 C.F.R. Pt. 213. Maximum permissible train speeds are determined based on a variety of factors, including the type of surface, structure, geometry, curvature, and elevation of the track. 49 C.F.R. 213.57, 213.59.[15] Like the analysis in No. 91-790, resolution of the question in No. 91-1206 requires analysis of the Secretary's train speed regulations in relation to the state-law requirement at issue.

4. Our review of the legal questions presented in these cases is ongoing. If the Court grants one or both petitions, we anticipate filing at the appropriate time a brief advising the Court of the views of the United States on the merits.

[15] The regulations establish six classes of track, and set a maximum speed for each class. For example, class 6 track, which carries the highest train speed limit, must meet tolerances for track gage (49 C.F.R. 213.53), track alignment (49 C.F.R. 213.55), track surface (49 C.F.R. 213.63), and the number of cross-ties in a defined length of track (49 C.F.R. 213.109).

CONCLUSION

The petitions for writs of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

MAUREEN E. MAHONEY
Deputy Solicitor General

WILLIAM K. KELLEY
Assistant to the Solicitor General

WILLIAM KANTER
JEFFREY CLAIR
Attorneys

JUNE 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312924 45453